



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: TECOM, Inc.

File: B-240421

Date: November 9, 1990

Ronald H. Uscher, Esq., Dempsey, Bastianelli, Brown & Touhey, for the protester.
John M. Taffany, Esq., Bailey & Shaw, for CSS, Inc., an interested party.
Gregory H. Petkoff, Esq., Department of the Air Force, for the agency.
Linda S. Lebowitz, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation provides for the possibility of a waiver of the statutory cost limitation on improvements on military family housing units, and such waiver is authorized by statute and regulation, challenge to agency's authority to request waiver fails to state a valid basis of protest under Bid Protest Regulations.

2. Protest that statements submitted by the agency in its request to the Under Secretary of Defense for a waiver of statutory cost limitation on improvements on military family housing do not state the necessary grounds and are insufficient to justify a waiver is premature because no decision concerning the waiver has been made and no contract has been awarded.

DECISION

TECOM, Inc. protests the proposed award of a contract to CSS, Inc. under invitation for bids (IFB) No. F29651-90-B0011, issued by the Department of the Air Force to upgrade military family housing (MFH), Phase II and III, at Holloman Air Force Base, New Mexico. TECOM argues that an award to CSS would be improper because its bid for Phase II of the project exceeds the solicitation's statutory cost limitation. TECOM essentially questions the propriety of the agency's request for a waiver of the statutory cost limitation to allow award to CSS.

We dismiss the protest.

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The solicitation was issued on March 15, 1990, and stated that award would be based on the aggregate price of the responsive, responsible bidder whose price is most advantageous to the government. Phase II of the project included remodeling 143 MFH units and removing all asbestos containing materials. The solicitation stated that Phase II was subject to a statutory cost limitation of \$38,546 per MFH unit (\$5,512,078 total) and that any bid exceeding the statutory cost limitation may be rejected. The solicitation also included the following cost limitation provision:

"A bid which does not contain separate bid prices for the items identified as subject to a cost limitation may be considered nonresponsive Bids may be rejected which (i) have been materially unbalanced for the purpose of bringing affected items within cost limitations, or (ii) exceed the cost limitations unless such limitations have been waived by the Under Secretary of Defense (Research and Engineering) prior to award."

Department of Defense Federal Acquisition Regulation Supplement (DFARS) §§ 252.236-7081, 236.580-1 (DAC 88-10).

CSS' bid for Phase II exceeded the statutory cost limitation, but CSS submitted the apparent low aggregate bid. For this reason, the agency requested a waiver of the statutory cost limitation pursuant to DFARS § 252.236-7081. This protest followed. While our Office was advised that the waiver decision would be made within a short time after the protest was filed, the decision has been delayed because of a moratorium on Department of Defense building construction projects.

TECOM argues that the agency's request for a waiver of the statutory cost limitation is improper because the agency has not made the showing necessary for a waiver--specifically, that the increase is required for the sole purpose of meeting unforeseen variations in cost that could not have been reasonably anticipated at the time the project was originally approved by Congress. See 10 U.S.C. § 2853(c) (1988). The agency reports that the increased amount is required due to the discovery in June 1989 of asbestos containing materials which were not known to exist at the time the agency submitted programming documents to Congress in March 1988.

Consistent with both statute and regulation, the solicitation specifically advised that bids could be rejected which exceeded the cost limitation unless such limitation had been waived by the Under Secretary of Defense prior to award. Therefore, bidders clearly were apprised in the solicitation

of the possibility that the agency could request a waiver of the statutory cost limitation in order to accept a low bid which exceeded the cost limitation. Under these circumstances, we think the request itself was authorized by solicitation, regulation, and statute, and TECOM's protest, to the extent it argues the request was not authorized, fails to state a valid basis of protest. 4 C.F.R. § 21.3(m) (1990).

TECOM also believes the statements submitted by the agency in its request for a waiver do not state the necessary grounds and are insufficient to justify a waiver of the statutory cost limitation. This is a decision which will be made by the Under Secretary of Defense. Since no decision has been made on the agency's request for a waiver and no contract has been awarded, TECOM's protest is premature.^{1/} See General Elec. Canada, Inc., B-230584, June 1, 1988, 88-1 CPD ¶ 512.

Accordingly, the protest is dismissed.^{2/}



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1/ The extent of our review of the Under Secretary's waiver decision is not at issue here. See generally Triax Pacific, Inc., B-236920, Jan. 23, 1990, 90-1 CPD ¶ 91; Wickham Contracting Co., Inc., B-200612, Dec. 4, 1980, 80-2 CPD ¶ 416.

2/ In its initial protest, TECOM argued that CSS' bid on Phase II was nonresponsive because it exceeded the statutory cost limitation. TECOM, in its comments did not pursue this matter and, in any event, the agency has not made any determination concerning responsiveness or responsibility, pending action on the waiver request.